IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum order and judgment of the United States District Court (Pet., App. A, B) are not reported. The opinion of the Eighth Circuit Court of Appeals (Pet., App. C) is reported at 574 F.2d 394, and its judgment is set forth in Appendix D of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Carrier's interest in the selection of its employees' bargaining representative rises to a status requiring the National Mediation Board to accord it procedural protections, in the form of a hearing on voter eligibility issues, during the Board's investigation of a representation dispute among the Carrier's employees.

2. Whether the Board performed its statutory duty to investigate a representation dispute among the Carrier's employees in the craft or class of pilot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, are set forth in Appendices E-1 and E-2 of the Petition.

STATEMENT

This litigation concerns the National Mediation Board's investigation of a representation dispute among the Petitioner's 58 pilots and its subsequent certification of the Respondent Union as their authorized representative for collective bargaining purposes. Thirty of the 58 eligible pilots voted by secret ballot for representation by the Union; the remaining 28 eligibles in the craft or class did not vote in the mail referendum election. (R. 39, 47; Pet., App. G, at 36) The controversy that led to this litigation involved the Petitioner's claim that *three* other persons it employed were eligible to vote. Both lower

Courts rejected the Petitioner's attempt to litigate these eligibility questions, either in constitutional guise or on the theory that the Board had violated its statutory duty to "investigate" the dispute, holding that the Board's eligibility determinations were not subject to judicial review. The Respondent Union and the Petitioner are now bargaining under an injunction issued on March 2, 1978 in a related case initiated by the Union. (Pet., App. F)

The underlying representation dispute began on January 19, 1976, when the Union applied to the Board for an investigation of the representation desires of the Petitioner's pilots and co-pilots in an appropriate craft or class. (R. 72) The case was docketed on February 17, 1976, and the Board's Mediator began his field investigation in Des Moines, Iowa, on March 3, 1976. (R. 72-73) He checked the authorization cards submitted by the Union with its application (R. 73), and obtained from the Petitioner a list of 66 names of employees allegedly covered by the application. (R. 54) This list omitted the names of two mechanics which were on a list submitted earlier, and were removed at the Mediator's request. (R. 53) The Mediator communicated with the Petitioner regarding five other individuals, including Reeves; however, he did not request information about Milner, Barber or Worden from the Carrier. (R. 54-55) The final eligibility list used in the mail referendum election contained fifty-nine names, including that of W. Shaw, a union adherent who had been discharged on February 27, 1976. (R. 53, 72-73) The election closed on March 29, 1976. (R. 54) Since thirty employees had voted for representation, a majority, the Board certified the Union as the craft or class representative on April 7, 1976. (R. 38-39, 73-74)

One week later, the Petitioner moved the Board to vacate its certification and schedule a formal evidentiary hearing (R. 40) on its contentions that several individuals were improperly held ineligible to vote, while Shaw

was improperly allowed to vote. (R. 42) The Board treated this motion as one for reconsideration. On May 5, 1976, it denied the motion because its investigation had disclosed that: (1) Milner functioned as an assistant chief pilot; (2) Barber performed check pilot duties in addition to functioning as an assistant chief pilot; (3) Reeves worked as a check pilot and instructor in the training department; and (4) Worden was excluded because he performed non-pilot duties.[1] (R. 46) The Board agreed that Shaw was ineligible (R. 46), but since he had not voted, the effect of his disqualification was to reduce the number of eligibles to fifty-eight and increase the Union's margin of victory. (R. 47; Pet., A-35 to -36)

The Petitioner filed suit on May 21, 1976, alleging that the Board had failed to investigate the representation dispute because it had not solicited specific information about Milner, Barber and Worden from Carrier officials, and that its due process rights had been violated because the Board had not advised the Petitioner that the above-named individuals' eligibility was in issue or afforded it an opportunity to be heard thereon. The relief requested included an injunction barring enforcement of the Union's certification, another determination of voter eligibility, an evidentiary hearing and a new election. (R. 6-8) In November, 1976, the Petitioner served written interrogatories on the Board seeking to discover, *inter alia*, employee ballots, identities of persons the Mediator contacted in resolving eligibility issues, and internal reports and memoranda. (R. 13-23) The Board's motion for a protective order staying discovery was granted (R. 91) pending disposition of the summary judgment motions filed by the Board and the Union. (R. 24, 32, 69)

[1] At the time of the election, Worden had been medically unfit to fly for approximately one year. He had been working in the air freight department and at other non-pilot duties on a regular basis, since he was not able to retain his pilot's license. (R. 83-84)

The District Court granted summary judgment in favor of the Board and the Union. It held that "an 'investigation' of the dispute, sufficient to preclude the finding of a gross statutory violation or of an ignorance of an express command of the Act, was undertaken." (Pet., A-5) Voter eligibility issues are committed to the Board's discretion, "and are not within the permissible ambit of judicial review." (Pet., A-6) A panel of the Eighth Circuit Court of Appeals affirmed. The record could not support a finding "that the Board acted in excess of its powers or contrary to a statutory provision. . . ." (Pet., A-15) Instead, it showed "that the Board did undertake to 'investigate' the dispute and to designate who might participate in the election. . . ." *Id.* Accordingly, the Court of Appeals held:

> "that the Board's eligibility decisions and election certification are not subject to further review; the Board has not violated a statutory duty in its conduct of the investigation; it has not failed to satisfy constitutional requirements because it did not further consult SMB or make SMB a party to the proceedings which designated the employee electorate." [Pet., A-18 to -19.]

ARGUMENT

I.

THE DECISIONS BELOW ARE PLAINLY CORRECT AND COMPELLED BY THIS COURT'S PRECEDENTS

Based on this Court's decisions in *Switchmen's Union* v. *NMB*, 320 U.S. 297 and *Railway Clerks* v. *Non-Contract Employees*, 380 U.S. 650, the Courts below concluded that jurisdiction to review the Board's actions in representation disputes is extremely limited. For Congress' intent in Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, " 'seems plain—the dispute was to reach its last terminal point when the administrative finding was

made. There was to be no dragging out of the controversy into other tribunals of law. . . .'" *Id.* at 659, quoting 320 U.S. at 305. "[T]he Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute. . . ." 380 U.S. at 661 (footnote omitted). It must be remembered, however,

> "that the Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.' . . . These principles are particularly apt here where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." [380 U.S. at 662 (citations and footnote omitted).]

After a searching inquiry, the District Court held that the Board had fulfilled its statutory duty to investigate the representation dispute among the Petitioner's pilots and granted summary judgment in favor of the Board and the Union. (Pet., App. A) In affirming the District Court's judgment, the Court of Appeals noted that the Petitioner Carrier's opposition papers showed that the Board had conducted a field investigation during which it received two lists of potential voters from the Carrier, and communicated with the Carrier's representatives relative to the eligibility of seven individuals; that it had defined the electorate and ascertained the employees' representation desires in a secret ballot election; and that the Board, as evidenced by its decision of May 7, 1976 (R. 44), "had not failed to give consideration to Barber, Milner and Worden's eligibility . . . ." (Pet., A-15) This Court's precedents were correctly applied to these facts.

Both lower Courts concluded that the Petitioner's suit "'appears to be challenging the quality and result of

[the] investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board.'" (Pet., A-5 to -6, A-15) In their view, the Petitioner's challenge "'does not go beyond asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority.'" (Pet., A-17); *WES Chapter* v. *NMB*, 314 F.2d 234, 237 (C.A. D.C.). This showing fell short of demonstrating that the Board had violated an "express command" of the statute, an element necessary to establish the District Court's jurisdiction. *Leedom* v. *Kyne*, 358 U.S. 184. The Board's certification cannot be reviewed on the alleged ground that an erroneous assessment of facts led the Board to a conclusion not comporting with the law. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481. Since the Petitioner's own submissions affirmatively showed that the Board had conducted an "investigation," there was no need to consider whether the District Court erred in not enforcing discovery against the Board. (Pet., A-17)

As the lower Courts held, the Petitioner's constitutional claim is no different from that asserted and rejected by this Court in *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. 650. There, as here, it was claimed that carriers "should be accorded a greater role in the Board's investigation." *Id.* at 667. Noting that the Act does not require a hearing, and that the sole requirement resulting from a Board certification is collective bargaining,[2] this Court concluded that the Car-

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[2] "It must be remembered that United is under no compulsion to reach an agreement with the certified representative. As Chief Justice Stone said in *Virginian R. Co.* v. *System Federation No. 40*, [300 U.S. 515, 558-59], 'The quality of the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power.' . . ." [380 U.S. at 667.]

rier's interest in representation issues did not rise "to a status which requires the full panopoly of procedural protections. . . ." *Id.* at 667. Moreover, the Court made clear that a requirement for full hearings in representation disputes was neither desirable nor contemplated by Congress because it would prevent the prompt resolution of representation disputes. *Id.* at 668.

> "Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carrier's. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board." [*Id.* at 666-67.]

The Petitioner seeks to distinguish *Railway Clerks* on grounds that the Board there had solicited the Carrier's statement regarding the Brotherhood's application; that after it had scheduled an election the Board continued to correspond with the Carrier, accepting and studying its detailed application for reconsideration of the decision to proceed to election in a craft or class the Carrier opposed; and that the Carrier had participated in a hearing involving other carriers some fifteen years earlier. (Pet., at 9) In the instant case, the Board similarly requested the Petitioner to make a statement with respect to the Union's application. (Exh. 3 to Griswold Aff'd., R. 73) The Board also received and carefully considered the Petitioner's motion to reconsider the eligibility rulings it opposed. (R. 40-47, 65)

Furthermore, the Petitioner did not object to the Board's craft or class determination (Pet., at 3), the resolution of which could have imposed some additional burden on its business operations (380 U.S. at 667), but contested

only eligibility issues in which the Carrier's business interest is not at all apparent. Since the Petitioner's interest in the representation proceeding in issue here is less compelling, and it was permitted to participate to the same degree as the Carrier in *Railway Clerks*, it is certain that the Board's investigation satisfied "any possible constitutional requirements that might exist . . . ." 380 U.S. at 368; see also *Virginian Ry.* v. *System Federation No. 40, supra*, 300 U.S. at 558.

II.

THERE IS NO CONFLICT OF DECISION

There is a remarkable uniformity among the several Circuit Courts of Appeal in their application of the rules announced in *Switchmen's Union* and *Railway Clerks*. Over the years, the Courts have declined to review the Board's discretionary actions in representation cases despite a variety of legal challenges. See *Aeronautical Radio, Inc.* v. *NMB*, 380 F.2d 624 (C.A. D.C.), cert. denied, 389 U.S. 912; *Air Line Stewards & Stewardesses* v. *NMB*, 294 F.2d 910 (C.A. D.C.), cert. denied, 369 U.S. 810; *BLF & E* v. *Kenan*, 87 F.2d 651 (C.A. 5), cert. denied, 301 U.S. 687; *Decker* v. *Venezolana*, 258 F.2d 153 (C.A. D.C.); *IBT* v. *BRAC*, 402 F.2d 196 (C.A. D.C.), cert. denied, 393 U.S. 848; *Radio Officers' Union* v. *NMB*, 181 F.2d 801 (C.A. D.C.); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (C.A. 2), cert. denied, 376 U.S. 913; *UNA Chapter, FEIA* v. *NMB*, 294 F.2d 905 (C.A. D.C.), cert. denied, 368 U.S. 956; *WES Chapter* v. *NMB, supra*, 314 F.2d 234; *World Airways, Inc.* v. *NMB*, 347 F.2d 350 (C.A. 9), cert. denied, 383 U.S. 926, reh'g. denied, 384 U.S. 914.

Contrary to the Petitioner's assertion (Pet., at 12-15), the Ninth Circuit Court of Appeals' decision in *International In-Flite Catering Co.* v. *NMB*, 555 F.2d 712

(C.A. 9) is not in conflict with the lower Court's decision in this case. In *IICC*, the Board certified the Union as the representative of the Carrier's employees on the basis of a check of authorization cards signed by a majority of employees in the craft or class. No secret ballot election was held. The cards used were entitled in boldface capital letters, "Request For Employees Representation Election . . . ." The Ninth Circuit held that the Board had not fulfilled its statutory duty to "investigate" because its action avoided the principal issue of whether the cards sufficiently indicated that signatory employees were selecting the Union as their representative.

Finding that the cards were to request an election only, a view consistent with various oral and written representations by union representatives, the Court concluded that the Board's position "contradicts the intended meaning of the employees who had signed the Request for Election card, the plain language on the card itself, and the spirit of the RLA . . . ." *Id.* at 719. Thus it held "that the NMB's certification . . . failed to comply with the requirements of § 2, Ninth, of the RLA and constituted an act contrary to the statute. . . ." *Id.* The Ninth Circuit emphasized the narrow reach of its ruling: "Whatever else may be said of prior case decisions, none of them address the facts of this case where simple, direct, plain language representations were made to IICC's employees and were ignored, and are still ignored by the NMB." *Id.* at 718.

IICC has no application to the reviewability issue in this case where it is undisputed that a field investigation took place, eligibility rulings were made and a secret ballot election was held. The difference between the two cases is critical. In *IICC*, according to the Ninth Circuit, the Board's action was not calculated to discover the wishes of a majority of craft employees as to their choice of bargaining representative. This was

equivalent, in the Court's view, to not making a statutory investigation at all. The Court below agreed with the Ninth Circuit's decision in *IICC*, but it did "not think the facts here present the same egregious set of circumstances." (Pet., A-16) For while the Petitioner's challenge criticized the quality and result of the Board's field investigation, as well as the fact-findings set forth in its decision of May 7, 1976 (R. 46), it also showed that the Board investigated the dispute employing methods and procedures it alone had authority to select. *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. at 662.

III.

THERE ARE NO IMPORTANT QUESTIONS OF FEDERAL LAW

The Petitioner contends that its unhappiness with the Board's internal procedures and its Mediator's supposed lack of diligence somehow give rise to an important, unresolved question of Federal law which this Court should settle. There are at least two difficulties with this view: First, this Court's decisions in *Switchmen's Union* v. *NMB*, *supra*, 320 U.S. 297 and *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. 650, already have settled any important question suggested by the Petition. and, second, the Petitioner's contention that the Board's investigation was insufficient rests on narrow, particularized facts concerning the purported voting eligibility of three individuals and the Board's examination of their status. In short, the Petitioner asks this Court to reconsider decisions which have been uniformly accepted and applied by the lower Courts, and to intervene in a unique squabble of interest only to the immediate participants.[3]

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[3] The Petitioner's complaint that it was denied discovery rights by the District Court is frivolous since its own affidavit, exhibits and pleadings show that the Board conducted a statutory investi-

The basis on which the Petitioner urges reconsideration is "that a re-examination of the . . . [NMB's] anachronistic procedures in light of 'current due process concepts' is overdue." (Pet., at 21) For support, it looks to comments made by the lower Courts in this case (Pet., A-12 n.3, A-19 n.5), where their preference for the National Labor Relations Board's procedure is made clear. It is ironic that the Court of Appeals chose to make its comment at this time when the NLRB's representation procedures, which afford employers full party status, are currently the subject of much criticism and active legislative consideration because they permit, through extensive litigation, lengthy delays in the exercise of employee selection rights.[4] More importantly, the Court of Appeals correctly acknowledged that the responsibility for effecting a change in the Railway Labor Act's representation machinery rests with Congress and not the Judiciary. (Pet., A-19 n.5) As the Second Circuit Court of Appeals aptly stated:

> "But the claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed . . . .

gation. In any event, its complaint hardly amounts to a viable claim that the Eighth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 19(b).

[4] See *1976 Interim Report and Recommendations of the Chairman's Task Force On the NLRB*, in "BNA Labor Relations Yearbook" 332-38 (1976). H.R. 8410, 95th Cong., 1st Sess. (1977), passed on Oct. 6, 1977, 123 *Cong. Rec.* H10713-14 (daily ed. Oct. 6, 1977); H.R. Rep. No. 95-637, 95th Cong., 1st Sess. 5 (1977); S. 2467, 95th Cong., 2d Sess. (1978), recommitted to the Senate Comm. on Human Resources on June 22, 1978, 124 *Cong. Rec.* S9412 (daily ed. June 22, 1978); S. Rep. No. 95-628, 95th Cong., 2d Sess. 4 (1978).

> For the courts to require the Mediation Board to transform itself into an adjudicative or prosecutorial agency like the NLRB or to impose themselves upon it would distort the entire congressional scheme . . . ." [*Ruby* v. *American Airlines, Inc.*, *supra*, 323 F.2d at 256.]

As recently as 1965, this Court considered and settled the very questions raised by the Petitioner. *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. 650. In doing so, it carefully considered the interests of carriers in the representation disputes of their employees, the Board's informal procedures, and the burden that greater carrier involvement in representation investigations "would visit upon the administration of the Act." *Id.* at 667. Balancing these considerations, this Court held that the Board's procedures satisfied "any possible constitutional requirements that might exist. . . ." *Id.* at 668. Nothing has happened since that time to warrant re-examination of its conclusion other than the criticisms made in the lower Courts' decisions. On the other hand, informed commentary indicates that "the Railway Labor Act procedures have satisfactorily resolved all representation disputes in the railroad industry and all such disputes involving flight employees in the airline industry. . . ." Rehmus, *The First Fifty Years —And Then?*, in "The Railway Labor Act at Fifty" 241, 245, 254 (1976).

The Petitioner's suggestion that an important Federal question somewhere lurks in the Board's determination that three individuals employed by a third-level air carrier were ineligible to vote defies reason. It is nothing more than an invitation, best declined, to embroil an already overburdened Federal Judiciary in the minutiae of day-to-day labor relations and the internal workings of the Board. In *Boire* v. *Greyhound Corp.*, *supra*, 376 U.S. 473, this Court found it necessary to caution the lower Courts that while they might intervene in representation

matters to strike down administrative action contrary to a specific statutory prohibition, they were precluded from reviewing discretionary administrative action turning on the agency's assessment of essentially factual issues. (Compare Pet., at 10) Because the Courts below understood that their authority was narrowly confined to inquiring whether an express statutory command was ignored, review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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